No. 83-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MURPHY OIL CORPORATION,
Petitioner,

v.

NAPH-SOL REFINING COMPANY,
Respondent

PETITIONER'S REPLY BRIEF

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The government's brief in opposition fails to meet the issues raised in Murphy's petition.[1]

1. The government does not deny that the court of appeals has expanded the circumstances in which an agency may issue a regulation without prior publication of notice and provision for public comment pursuant to section 4(b)(B) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(B). But the government's assertion that TECA "carefully limited" its decision to the facts before it (Opp. at 21) is not correct. Quite the reverse; TECA held

[1] The government's opposition, although filed under the caption of No. 83-1515, Mobil Oil Corporation v. United States Department of Energy, also purports to respond to the petition in the present case. *See* government's Opposition at 9 fn. 9 (hereinafter referred to as "Opp.").

The opposition of Naph-Sol in this case does not require response.

that the rule in this case is an expansion of an earlier holding in which a similar doctrine had been limited to "calamitous" circumstances. Now it is applicable even in the absence of "calamitous" circumstances. Pet. App. 28a-29a. The government does not cite any language in the court's opinion limiting applicability of the new principle, and none exists. Given Congress' insistence—obviously highly salutary—that the situations in which an agency may issue a regulation without public notice or an opportunity for comment be kept as few as possible (*See* Pet. 17), a decision like this one is of obvious importance.

2. The government fails to come to grips with the fact that the court of appeals upheld the September 5 rulemaking only by relying on material extraneous to the September 5 publication, i.e., the September 10 notice.

The government first tries evasion, claiming that there was no new material in the September 10 notice. Opp. at 16 fn. 13. But that is not what the court of appeals thought. The court specifically noted that the September 5 preamble had not pointed out that the danger sought to be avoided by publication without prior notice was supposed injury to independents and sections of the country; these factors were not mentioned by the agency until the September 10 notice. Pet. App. 32a. The fact that independents were said to be threatened was the heart of the Court's reason for upholding the September 5 rulmaking. Pet. App. 29a, 30a, 31a (text at fn. 21), 32a, 37a. Thus, the point absent from the September 5 preamble was central to the court of appeals' holding.

Second, the government asserts that the September 10 notice was not a "made for litigation" rationalization. Opp. at 16, fn. 13. But that is not the issue. The APA requires that the justification for issuance of a rule without notice and comment be "incorporate[d] . . . *in the*

rules issued. . . ." 5 U.S.C. § 553(b)(B). Since the September 10 notice was not published "in the rules" issued on September 5, it does not meet that statutory requirement, and both the government and the court of appeals have read this requirement out of the statute—a view not only wrong but in conflict with decisions of other courts of appeals (Pet. 14).[2]

3. The government also seeks to avoid the fact that the court of appeals relied on extra-record assertions from agency counsel. Petition at 15-17. The court of appeals upheld the agency's action only because it found that "the competitive viability of the independents" would be threatened, and "severe market dislocations and erosion of the class of purchaser scheme" would have resulted if the agency had provided notice and an oppor-

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[2] Moreover, the fact that September 10 followed September 5 by only five days does not mitigate the mischief in this holding. The September 10 notice did not purport to explain why earlier publication of the rule without notice and comment was valid. It is only logical that if the agency had thought that those matters supported issuance of the rules without notice and comment, it could and no doubt would have said so in the September 5 notice. It is not very difficult to set pen to paper to explain why one thinks that an emergency exists.

The fact is that the agency's true reason for publishing the rules without notice and comment was not that any emergency existed or would be caused by publication of notice; rather the agency thought—wrongly—that its desire to clear up what it said was an ambiguity in its rules would suffice, and that is what the September 5 notice actually said. Pet. App. 57a. It was only in 1980 when the agency realized that this "immediate guidance" rationale was inadequate that its litigation counsel stitched together the patchwork assertion that there had been an emergency (or that one would have been caused by appearance of a notice of proposed rulemaking) in September 1974. Pet. 16 at fn. 12. It was this afterthought that the court of appeals accepted.

tunity for public comment on the rule. (Pet. 16; Pet. App. 27a.)

We showed in the Petition (at 15-17) that these statements have no record support and are only argument of the agency's litigation counsel. In response, the government does not acknowledge or attempt to defend the court of appeals' reliance on these inventions. Rather it simply ignores them and pretends that the court of appeals' holding was based on the blander finding that notice and comment "would lead to price discrimination and pressure on independents and regions." Opp. at 14. It is clear, however, that the court of appeals placed extensive reliance on the stronger conclusions (Pet. App. 27a), and by simply ignoring them the government's opposition effectively concedes that that reliance was improper.

4. The government has no support for its assertion that the court of appeals correctly held that the agency repromulgated the rule on December 5, 1974. Opp. at 19-20. Unable to ignore our showing that no such decision had been made (Pet. 24), the government concedes (Opp. at 6) that on December 5 the agency "deferr[ed]" a decision on the September 10 proposal. In an astonishing leap, the government then concludes that this decision to "defer" action on the proposal was a decision to repromulgate the rule. *Ibid.* In other words, the fact that the agency had decided to keep the rule may be deduced from its statement that it had not yet decided whether to keep it. Despite this nonsense, the government goes on to defend the court of appeals' holding that it could "discern" the agency's reasons for making up its mind on December 5. (Opp. 20).

Two points, we submit, are clear. There was no agency rationale to "discern" on December 5 because, as we

pointed out (Pet. 24) and as the government concedes (Opp. at 6), the agency had not made up its mind and thus had no rationale.

Second, there is every reason for this Court to disapprove the court of appeals' holding that if a reviewing court thinks it can discern the basis of an agency's decision to issue a rule, there was no need for the agency to supply the statement of basis and purpose flatly required by 5 U.S.C. § 553(c). The statute's requirement of explicitness is wise, as this case richly shows. What the court of appeals thought was "obvious" did not exist. The decision below thus does provide an escape route—warmly embraced by the government—from the duties of articulation and explanation that are otherwise imposed by *Motor Vehicle Manufacturers' Association* v. *State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856 (1983).[3]

5. A major theme of the government's opposition is that it is too late to correct any errors made by the agency in 1974. Opp. at 21. The government does not explain why such an argument is fair. Murphy is a defendant and did

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[3] Moreover, the government's repeated assertions that the purpose of the rule was "obvious" (i.e., to protect against discrimination) are not worth much. As the government is forced to concede, before September 5 there already was an agency rule forbidding price discrimination, as well as antitrust laws to the same effect. Opp. 16, fn. 13. The real question is whether the deemed recovery rule, which imposes a grossly overbroad penalty (Pet. 7), was conceded by the agency to be inflexible, "troublesome," and causative of "dislocations in the market" (Pet. 8), and which was criticized by the Antitrust Division of the Justice Department as anticompetitive (Pet. 9), was necessary or wise. These questions were never explicated by the agency (except when it repealed the rule in 1980; Pet. 9), and the court of appeals was untroubled by that fact.

not choose when it would be sued. Pet. 24 fn. 19. It should not be penalized for the delays of its adversary.

Respectfully submitted,

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